NO. 48841-8-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

BOBBIE HANSEN A/K/A BOBBIE HANSEN VALENTICH,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. The challenged portions of the Lewis County Code are unconstitutional as applied to Ms. Hansen

Contrary to the State's argument contained in its responsive brief, the relevant sections of the Lewis County Code (LCC) are unconstitutional as applied to Ms. Hansen

Ms. Hansen was charged with violation of Lewis County Code §§ 1.20.040(4)(b)-(c), LCC 8.45.130(4)(a) (pertaining to solid waste violations), and LCC 15.05.110(b)(1)(b)-(c) (pertaining to alleged building violations.)

LCC 1.20.040(4), which pertains building, zoning, environmental health, provides in relevant part:

> (b) **Upon request of the authorized official, the person alleged or apparently in violation of this chapter shall provide information identifying themselves.**
> (c) **Willful refusal to provide information identifying a person as required by this section is a misdemeanor.**

LCC 8.45.130(4)(a), which pertains to solid waste regulation, provides in relevant part:

> (4) Violations and Penalties - Persons Requiring a Permit. The requirements in this section apply to all persons which are required to obtain a permit under these regulations, or rules and regulations adopted under them.
> (a) Violations - Investigations - Evidence. An authorized

representative of the department may investigate alleged or apparent violations of these regulations. **Upon request of the authorized representative of the department, the person allegedly or apparently in violation of these regulations shall provide information identifying themselves. Willful refusal to provide information identifying a person as required by this section is a misdemeanor.**

LCC 15.05.110(b)(1)(c), which pertains to building codes, provides in relevant part:

> (1) Violations, Investigations, Evidence.
>
> a. The building official may investigate alleged or apparent violations of the provisions of this chapter, or the provisions of the State Building Codes adopted by reference by this chapter. In the performance of that investigation, the building official may enter upon any land and make examinations and surveys, provided that such entries, examinations and surveys do not damage or interfere with the use of the land by those persons lawfully entitled to the possession thereof.
>
> **b. Upon request of the building official, the person alleged or apparently in violation of this ordinance shall provide information identifying themselves.**
>
> **c. Willful refusal to provide information identifying a person as required by this section is a misdemeanor.**

(Emphasis added).

Several methods of challenges to "stop-and-identify" statutes are possible. For instance, the identification requirement may be violative of an

individual's First Amendment right not to speak. This right has been recognized by the United States Supreme Court on several occasions. See, e.g., *Wooley v. Maynard*, 430 U.S. 705, 709, 97 S.Ct. 1428, 1432, 51 L.Ed.2d 752 (1977); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633, 63 S.Ct. 1178, 1182, 87 L.Ed. 1628 (1943). The identification requirement may violate the Fifth Amendment privilege against self-incrimination. See *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 77, 86 S.Ct. 194, 198, 15 L.Ed.2d 165 (1965). The statute can also be attacked as unconstitutionally vague, in violation of the Fourteenth Amendment's due process clause. Fourth, such statutes may also be attacked as violative of the spirit of the Fourth Amendment's prohibition against unreasonable searches and seizures. But see, *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004).

A defendant may challenge a statute as being unconstitutionally vague on its face or "as applied." As the term implies, an "as applied" challenge calls on the court to consider whether a statute can be constitutionally applied to the defendant under the facts of the case. The cited Lewis County ordinances are unconstitutionally vague as applied to the facts of this case,

where Ms. Hansen was previously in communication with the appropriate Lewis County authorities, had communicated with them in the past, and where her identity was already known to the county enforcement official, and who addressed her by her correct first name when he went to the property on April 20, 2015. RP (1/6/16) at 31-33, 34, 44.

Due process requires that penal statutes be drawn with sufficient specificity so that persons of common understanding will be on notice of the activity prohibited by the statutes. *State v. Richmond*, 102 Wn.2d 242, 243, 683 P.2d 1093 (1984). The fundamental principal underlying the vagueness doctrine is that the Fourteenth Amendment requires citizens be afforded fair warning of proscribed conduct. *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992).

The Fourteenth Amendment to the United States Constitution provides in part that no "State (shall) deprive any person of life, liberty, or property, without due process of law . . ." Article 1, § 3 of the Washington State Constitution likewise states that, "No person shall be deprived of life, liberty, or property, without due process of law." The State Constitution offers no greater protection than the federal due

process clauses of the Fourteenth Amendment. *State v. Manussier*,129 Wn.2d 652, 679, 921 P.2d 473 (1996). Under the due process clause of the Fourteenth Amendment, citizens must be afforded fair warning of proscribed conduct. *Rose v. Locke*, 423 U.S. 48, 49, 96 S. Ct. 243, 244, 46 L. Ed. 2d 185 (1975).

a. Standard of review for invalidity

A statute's constitutionality is a question of law that a court review de novo. *State v. Abrams*, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008). In an as applied challenge to a statute's constitutionality, a party alleges that the statute's application in the specific context of the party's actions is unconstitutional. *State v. Brosius*, 154 Wn.App. 714, 718, 225 P.3d 1049 (2010). A decision that a statute is unconstitutional as applied does not invalidate the statute but, rather, prohibits the statute's future application in a similar context. *Brosius*, 154 Wn.App. at 718–19, 225 P.3d 1049.

"A court will presume that a statute is constitutional and it will make every presumption in favor of constitutionality where the statute's purpose is to promote safety and welfare, and the statute bears a reasonable and substantial relationship to that purpose." *State v. Glas*,

147 Wn.2d 410, 422, 54 P.3d 147 (2002). The person asserting a vagueness challenge bears the heavy burden of proving the statute's unconstitutionality beyond a reasonable doubt. *City of Spokane v. Douglass*, 115 Wn.2d 171, 177, 795 P.2d 693 (1990).

b. The challenged ordinances are unconstitutionally vague as applied to Ms. Hansen.

The three challenged LLC ordinances are unconstitutional as applied to Ms. Hansen because they present unconstitutional burdens on her Fourteenth and Fifth Amendment rights and their corresponding Washington constitutional provisions. If the challenged statute does not involve First Amendment rights, the courts evaluate the vagueness challenge by examining the statute as applied under the particular facts of the case. *Coria*, 120 Wn.2d at 163.

"A vague statute violates due process." *Haley v. The Med. Disciplinary Bd.*, 117 Wn.2d 720, 739, 818 P.2d 1062 (1991). The challenging party must show that either (1) the statute does not define the criminal offense with sufficient definiteness so that ordinary people can understand what conduct is proscribed, (the "definiteness prong") or (2) the statute does not provide ascertainable standards of guilt to protect against

arbitrary enforcement. (the "arbitrary enforcement prong"). *Coria*,120 Wn.2d at 163. Failure to satisfy either requirement renders the condition void for vagueness. *State v. Bahl*, 164 Wn.2d 739, 752-53, 193 P.3d 678 (2008).

The requirement of sufficient definiteness "protects individuals from being held criminally account able for conduct which a person of ordinary intelligence could not reasonably understand to be prohibited." *Coria*, 120 Wn.2d at 163. Accordingly, a statute is unconstitutional if it "forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application." *Coria*, 120 Wn.2d at 163.

As noted above, vagueness challenges to statutes that do not involve First Amendment rights generally---but not exclusively---are examined on an as applied basis. *State v. Worrell*, 111 Wn.2d 537, 541, 761 P.2d 56 (1988). Here, the ordinances are unconstitutionally, impermissibly vague as applied to Ms. Hansen. An as-applied challenge stems from a defendant's argument that the application of the statute to the defendant's particular situation is unconstitutional A statute is void for vagueness under the Fourteenth Amendment if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning

and differ as to its application. *Papachristou v. Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). To succeed on an as-applied vagueness challenge, a defendant must show that the statute failed to provide fair notice that the defendant's conduct was prohibited or failed to provide sufficient guidelines such that police had unbridled discretion in determining whether to arrest the defendant.

In this case, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *Smith v. Goguen*, 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). Although the challenged ordinances are significantly different from a typical "stop and identify" statute in the important respect that they involve civil code enforcement, courts have noted that statutes requiring of this type of contact and requirement of identification can result in impermissible intrusions into an individual's right to privacy and can implicate other rights specifically enumerated in the Bill of Rights. Therefore, "statutes in the

nature of stop-and-identify statutes must be carefully and restrictively drawn." *State v. White,* 97 Wn.2d 926, 40 P.2d 1061 (1982). See also, Note, "Your Papers, Please."---Is an Identification Requirement Constitutional?, 37 *Wash. & Lee L.Rev.* 253-67 (1980). The ordinances involved in this case are defective both in the sense that the language, which is almost identical in each section, fails to give fair notice of what level of cooperation with the questioning code enforcement officer is required or forbidden and because it encourages arbitrary arrest.

The flaws in the LCC ordinances are overt. For example, when must a citizen answer inquiries by a department representative? What is lawfully required in the way of identification? Is acknowledging a first name sufficient when the person has been in previous contact with the agency? Is an "authorized official" also a "unauthorized representative?" The ordinances are unclearly and unartfully drafted and use three different terms for the person acting on behalf of the department, implying that the roles between the departments may not be the same. For instance, LCC 1.20.040 refers to an "authorized official," while LCC 8.45.130 refers to an "authorized representative. LCC 15.050.110 refers to a "building official." May a

representative of one department ask for identifying information for a violation that may fall within the jurisdiction of another department, or only those charged with investigating or enforcing laws and regulations germane to his or her department? Moreover, the ordinances do not put a citation on notice as to what type of "identifying information" is required. The possible applications and interpretations of the ordinances are extensive.

Second, the ordnances contain no reference to aid in determining what a suspect has to do in order to satisfy the requirement to provide identification. The capacity for arbitrary enforcement inherent in the ordinances is shown this case, where she testified that code enforcement officer Smokey Padgett demanded that she needed to show her a driver's license or Washington State Identification, something the ordinance does not specify. RP (1/8/16) at 89. Regarding the arbitrary enforcement prong, the ordinances present an inordinate amount of discretion by the county and fail to provide adequate enforcement standards. Here, the officials knew Ms. Hansen's identity; Mr. Padgett had been in contact with her as early as February 2013 regarding the alleged violations. RP(1/1/16) at 61-62. The fact that her identity was known is demonstrated by the fact that Mr.

Padgett called her Bobbie, and she responded that it was her name. RP at (1/16/16) at 76. The unconstitutionality of the ordinances is demonstrated by the fact that despite his knowledge of her identity, the officer chose to arbitrarily interpret her exasperation, as demonstrated by her unwillingness to have a discussion about her identity, when her identity was already known to the county officials. As such, the statute vests virtually complete discretion in the hands of county officials to determine whether the suspect has satisfied the ordinance.

Under the ordinance as it is written, this Court should conclude that the ordinance cannot be constitutionally applied to Ms. Hansen's alleged failure to identify herself.

LCC 1.20.040, 8.45.130(4)(a), and 15.05.110(b)(1)(c) are also unconstitutional as applied under the Fifth Amendment because Ms. Hansen had a Fifth Amendment right to remain silent and not answer questions by county officials. The Fifth Amendment provides that "[n]o person ... shall be compelled in any criminal case to be a witness against himself." This provision applies to the states through the Fourteenth Amendment's due process clause. U.S. Const. amend. XIV, § 1; *Malloy v. Hogan*, 378 U.S. 1, 6,

84 S.Ct. 1489, 12 L.Ed.2d 653 (1964). Ms. Hansen argues that the LCC ordinances are unconstitutional as applied because she had a Fifth Amendment right to not answer a county employee investigating a civil matter and not conducted in the context of a "*Terry* stop." This Court previously considered a challenge to a "stop and identify" statute brought pursuant to the Fifth Amendment in *State v. Steen*. 164 Wn.App. 789, 265 P.3d 901 (2011). Citing *Hiibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004), this Court found that the Fifth Amendment privilege did not apply to a statute prohibiting obstruction of an officer because Steen could not reasonably believe that disclosing his presence, name, or date of birth would incriminate him. Ms. Hansen submits, however, that *Hiibel* is not persuasive authority in this case. *Hiibel* is inapposite in that it involved a "*Terry* stop," whereas this case involves civil code enforcement. In *Hiibel*, police responded to a reported assault and asked Hiibel to identify himself when they approached him at the scene. Hiibel refused and was arrested pursuant to Nevada's stop and identify law. The *Hiibel* Court found that the defendant's duty to disclose his name under the stop and identify statute "presented no reasonable danger of

incrimination" and, therefore, did not implicate his Fifth Amendment privilege against self-incrimination. *Hiibel*, 542 U.S. at 189–90, 124 S.Ct. 2451. Instead, Hiibel "refused to identify himself only because he thought his name was none of the officer's business." *Hiibel*, 542 U.S. at 190, 124 S.Ct. 2451.

Hiibel was brought under a Fourth Amendment analysis involving a *Terry* stop. Ms. Hansen submits that *Hiibel* is not persuasive authority because the case necessarily had the added element of *Terry* protections requiring the officer to provide specific and articulable facts that gave rise to a reasonable suspicion that there is criminal activity afoot. In the LCC ordinances, on the other hand, no such protection exists. Instead, the homeowner or landowner is faced with a county employee who, believing there is a civil code violation, questions the property owner and may compel the homeowner to disclose his or her "identifying information." In addition to leaving vague precisely what level of cooperation a homeowner is required to provide, under the ordinance the county officer is not under the corresponding obligation present under the extensive body of law governing *Terry* stops regarding intrusion into a citizen's affairs and the necessarily of

basing the intrusion on a specific and articulable facts leading to a reasonable suspicion of criminal activity. Accordingly, the ordinances are subject to a variety of governmental mischief because of the virtually non-existent standard required under the ordinances in which to compel a landowner to disclose identifying information. Instead of specific and articulable facts, the county officials may request identifying information from the landowner merely her or she believes the landowner is in code violation.

In addition, because this case does not involve investigation of a criminal matter, but instead civil code enforcement, the considerations of officer safety, or interference with law enforcement while performing necessary community caretaking duties, is not present. Without the elements inherent in law enforcement that justify obtaining identifying information (after meeting the initial threshold announced in *Terry* and its progeny), the ordinance runs afoul of Ms. Hanson's constitutional right to remain silent. Under Washington law, "[a] person cannot be punished for refusing to speak." *State v. Williams*, 171 Wn.2d 474, 484, 251 P.3d 877 (2011) (citing *State v. Contreras*, 92 Wn.App. 307, 316, 966 P.2d 915 (1998) ("[m]ere refusal to answer questions is not sufficient grounds to arrest for

obstruction of a police officer.")).

Ms. Hansen had a constitutional right to remain silent under the Fifth Amendment. She did not otherwise frustrate or obstruct Mr. Padgett on April 20, 2015. As a result, the "identification" ordinances are unconstitutionally vague as applied to Ms. Hansen and also constitute a violation of her Fifth Amendment right. This Court should find the ordinances as applied to Ms. Hansen is unconstitutionally vague and reverse her convictions.

B. CONCLUSION

Based on the forgoing, as well as the previously submitted briefs of the appellant, the ordinances are unconstitutionally vague as applied to Ms. Hansen.

DATED: January 13, 2017.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
Of Attorneys for Bobbie Hansen

CERTIFICATE OF SERVICE

The undersigned certifies that on January 13, 2017, that this Appellant's Opening Brief was sent by the JIS link to Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the Bobbie Hansen and a copy was e-mailed to Sara Beigh:

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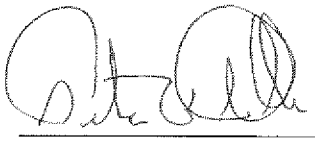
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 13, 2017.



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